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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

In re TRAVIS S., a Person Coming Under the Juvenile Court Law.	B293853
THE PEOPLE,  Plaintiff and Respondent,  v.  TRAVIS S.,  Defendant and Appellant.	Los Angeles County Super. Ct. No. TJ23068

APPEAL from orders of the Superior Court of Los Angeles County, Catherine J. Pratt, Judge. Conditionally reversed and remanded with instructions.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Steven D. Matthews and Analee J. Brodie,  
Deputy Attorneys General, for Plaintiff and Respondent.

## **INTRODUCTION**

Minor Travis S. appeals the jurisdictional and dispositional orders entered after the juvenile court sustained a delinquency petition for attempted robbery. He contends that there is insufficient evidence he acted as an aider and abettor. We do not reach that issue, however, because we cannot determine from the record before us whether the court found the allegation was proven beyond a reasonable doubt. We therefore conditionally reverse the orders and remand with directions.

## **BACKGROUND**

### **1. The Attempted Robbery**

On April 29, 2018, at 12:45 p.m., Teresa Gutierrez was walking down a residential street in Los Angeles. The sidewalk was three or three and a half feet wide. Gutierrez saw a black car drive by; it did not slow as it passed her. She also heard footsteps behind her. As the black car drove by a second time, it slowed a bit and stopped at the curb down the street. At this point, the footsteps sped up.

The footsteps belonged to two boys. The boys split up to pass Gutierrez—one on either side. The boy on the left was about 5 feet 6 inches tall—a little shorter than Gutierrez—with dark skin. The boy on the right, later identified as Travis, was shorter, younger, and had lighter skin. As the boy on Gutierrez's left passed her, he knocked into her with his shoulder and tried to grab her cell phone, which she was holding in her left hand. When Gutierrez resisted, the boy immediately let go of the phone

and continued walking. The entire encounter took less than five seconds.

Travis had continued “walking around” during the five-second struggle. He did not say anything. When asked whether Travis and the boy on the left stopped as they passed her, she testified, “No. I think it was more like a slow down when everything was taking place. Not a complete stop. It was just a slow down while everything was taking place and then continued walking.” Travis made no attempt to keep Gutierrez from moving. When he was a few feet past her, Travis turned his head for one second to look at what was going on behind him, then kept walking. Gutierrez had not paid attention to Travis until that moment; she didn’t look at him until he had already passed her.

In sum, Gutierrez testified:

Q. Did [Travis] say anything to you?

A. No.

Q. Did he do anything?

A. No.

Q. Did he make any physical contact with you?

A. No.

The boy on the left caught up to Travis, and the two of them got into the waiting black car. The car drove away.

Gutierrez called the police. The police drove her around for 15–20 minutes until they found the car parked at a nearby gas station. Gutierrez identified Travis and the perpetrator as the

boys involved.<sup>1</sup> The officers did not ask her what role each boy had played in the incident.

## **2. Procedural History**

On June 27, 2018, a petition was filed under Welfare and Institutions Code section 602 alleging that Travis had committed attempted second degree robbery (Pen. Code, § 664/211; count 1). Travis denied the allegation.

After a jurisdiction hearing at which Travis did not testify, the court found count 1 to be true on the theory that Travis was acting as an aider and abettor, and sustained the allegation as a felony. The court declared Travis a ward of the court, and placed him on home probation with a maximum confinement period of three years. Among other conditions of probation, the court ordered Travis to complete 50 hours of community service and to pay a restitution fine of \$110.

Travis filed a timely notice of appeal.

## **DISCUSSION**

Travis contends there is insufficient evidence that he assisted the attempted robbery. We do not reach that issue, however, because we cannot determine from the record before us whether the court applied the correct burden of proof, proof beyond a reasonable doubt, to the evidence admitted at the jurisdiction hearing and any reasonable inferences therefrom.

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<sup>1</sup> The record does not reveal the name of the perpetrator or whether charges were filed against him. It's also unclear whether the driver was still present at this point.

## 1. Elements of Aiding and Abetting

To establish a defendant's liability as an aider and abettor, the prosecution must first prove that a crime was committed. (*People v. Perez* (2005) 35 Cal.4th 1219, 1227.) Then, they must prove: (1) the defendant knew the perpetrator intended to commit the crime; (2) before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and (3) the defendant's words or conduct *did in fact* aid and abet the perpetrator's commission of the crime. (*People v. Lopez* (2013) 56 Cal.4th 1028, 1069, overruled in part on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; see also Pen. Code, § 31; CALCRIM No. 401.) Here, there is no dispute that the perpetrator committed attempted robbery. (See *People v. Anderson* (2011) 51 Cal.4th 989, 994 [elements of robbery].) The question is whether Travis's actions *actually* aided and abetted that attempted robbery.

Whether a defendant acted as an aider and abettor is judged under the totality of the circumstances. (*People v. Morga* (1969) 273 Cal.App.2d 200, 207.) "Mere presence at the scene of a crime is not sufficient to constitute aiding and abetting, nor is the failure to take action to prevent a crime ... ." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 529–530.) Likewise, a defendant's presence in the offender's company before or after the crime does not establish liability as an aider and abettor. (See *People v. Hill* (1946) 77 Cal.App.2d 287, 289, 292–294.) Nevertheless, "presence at the crime scene, companionship, and conduct before and after the offense" are factors that "may be considered in determining aiding and abetting" liability. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5.)

Nor is it sufficient that a defendant knows in advance what the perpetrator plans to do. (*People v. Horton* (1995) 11 Cal.4th 1068, 1115 [“knowledge that a crime might be committed by defendant in the future did not amount to aiding and abetting the commission of that prospective crime”]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [“Mere presence at the scene of a crime which does not itself assist its commission or mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.”].) The prosecution must also prove that the aider and abettor “does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator’s commission of” the target offense. (CALCRIM No. 401.)

Thus, the issue before the court was whether Travis took any substantive action in furtherance of the attempted robbery.

**2. It is unclear whether the court found the allegation was proven beyond a reasonable doubt based on the evidence admitted and reasonable inferences therefrom.**

A court may not sustain a juvenile delinquency petition unless the prosecution proves the allegations beyond a reasonable doubt by evidence legally admissible in a criminal case. (Welf. & Inst. Code, § 701; *In re Winship* (1970) 397 U.S. 358, 363–368; *In re Curt W.* (1982) 131 Cal.App.3d 169, 182.) But in this case, we cannot determine from the record before us whether the court found the prosecution proved the allegation beyond a reasonable doubt.

Before announcing its findings, the court explained:

Aiding and abetting robbery can always be somewhat vague because of the nature of the act of robbery.

That is particularly true when we have an attempted robbery, as we do here.

It is common for people committing robberies to work in pairs or groups in order to achieve the force or fear element of the robbery that is necessary for the person to give up property, and I think that that is always important to be considered.

I think in this instance, I particularly thought it was relevant, Ms. Gutierrez's description of the relative size of the three of them. She described [the perpetrator] as being the taller of the two and to be about her height or a little bit shorter, I believe, than her. And she estimated that person to be 5-foot-6-inches in height.

And she identified the smaller—the other person as being smaller.

Ms. Gutierrez is, I would say, a pretty average-sized woman. I think 5'6" is about right. She may be a bit taller than that.

But I would not—in an instance where you have potential perpetrators who are relatively small, then working in pairs might be even more relevant in that instance.

Immediately after these statements, the court said, "I think frankly, **it's a very close call** as to what exactly Travis's role was and whether it could be deemed as aiding and abetting. But, I do believe there is sufficient evidence **from me** to conclude that he was involved as an aider and abettor." (Emphasis added.)

Then, after discussing the facts of the case, the court concluded: “I do believe that there’s sufficient evidence based on that for me to find by implication that [Travis] was acting as an aider and abettor and I will find count 1 to be true at this time.”

From this record, including the court’s statement that “it’s a very close call,” we cannot determine whether the court weighed the evidence presented at the jurisdiction hearing and found the prosecution proved the allegation beyond a reasonable doubt. We also cannot determine whether the court’s comments about the criminal propensities of “potential perpetrators who are relatively small” were part of the basis for its decision in this “very close” case.

We therefore conditionally reverse and remand for further proceedings. On remand, the juvenile court shall articulate what burden of proof it is applying and explain the evidentiary basis for its finding. In so doing, the court should rely only on the evidence admitted at the jurisdiction hearing and reasonable inferences therefrom.<sup>2</sup> We express no opinion about what the court’s finding should be.

If, upon reconsideration, the court holds that the prosecution did not prove the allegation beyond a reasonable doubt, the conditional reversal shall become final, and the court

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<sup>2</sup> The People did not present any expert testimony that short people are more likely to commit crimes in groups than tall people. Nor did they present any evidence that robbers are more likely to work in pairs or groups than they are to work alone. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1266 [“A fine line exists between using one’s background in analyzing the evidence, which is appropriate, even inevitable, and injecting ‘an opinion explicitly based on specialized information obtained from outside sources,’ which we have described as [juror] misconduct. [Citation.]”].)



shall dismiss the petition. If the court holds, based on the evidence admitted at the jurisdiction hearing and any reasonable inferences therefrom, that the prosecution proved the allegation beyond a reasonable doubt, the court shall reinstate the original decision and sustain the petition.

Because we do not know what the court's decision will be upon remand, we do not resolve Travis's argument that the evidence presented at the jurisdiction hearing is legally insufficient to support the court's orders. He may raise that argument again, however, in any appeal from orders entered at the remand proceeding.

## **DISPOSITION**

The orders are conditionally reversed and the matter is remanded for proceedings consistent with the views expressed in this opinion.

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LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.